

second tube connection means connecting a second flexible tube to said second spout to transfer air between the exterior of said flask and interior said flask; and pump means attached to the distal end of said second flexible tube for pumping air into said interior of said flask.

REMARKS

Claims 1-33 and 36 were pending and claims 34 and 35 may have been pending in this application. However, close review of the Preliminary Amendment of December 24, 2001 shows that claim 34 was canceled and what was to be claim 35 was accidentally or erroneously numbered as 34. To the extent there is either a claim 34 and/or a claim 35, it is easiest to cancel both and present what was to be claim 35 as new claim 37.

Claim 1 was amended to provide a more clear statement. Claims 2, 8, 14, and 16 are amended to depend now from generic claim 39. Claims 27, 30 and 32 are amended to present them in better form.

Claims 38-44 are being presented as generic claims.

Upon entry of this amendment, claims 1-33, 36-44 will be in the case with claim 1 subject to cancellation as directed to a non elected species.

Allowable Subject Matter Suggests Improper Species

Claims 1-32, 36 and 37 presented in this application as first amended are the same as claims 1-34 presented in a parent application serial 09/770,921 filed 26 January 2001. On May 31, 2002, Publication of the parent was imminent because its priority date was the filing date of a prior provisional application filed January 28, 2000. Applicants did not want the application to be published, so the present continuation was filed on May 31, 2002 and the parent was abandoned.

An Office Action mailed June 27, 2001 issued in the parent application before the abandonment notice submitted with the Continuation on May 31, 2001 reached the Examiner. A copy of the Office Action mailed June 27, 2001 and a copy of the Notice of Abandonment dated July 5, 2001 are enclosed. The Office Action reported an examination on the merits of claims that are substantively the same as those pending in this case. It rejected the independent claims under 35 U.S.C. § 112; but did not reject the claims on any other grounds. To avoid the rejections and expedite processing of this application to allowance, Applicants submitted a PRELIMINARY AMENDMENT dated 24 December 2001 by which the claims were amended to avoid the rejections.

In order to issue an office action in the prior parent application, the Examiner appears to have conducted a search as to all pending claims. MPEP § 704. No claims were rejected over art even though a Notice of References Cited was included; and contained a listing with several references listed.

Piecemeal examination is typically avoided. MPEP § 707.07(g). There being no specific reason to delay examination or proceed on a piecemeal basis, it would seem that the Examiner had ostensibly determined the absence of a basis to reject the claims. In turn, upon correction, they would then be allowable over the art.

Assuming all the 112 issues were resolved to the satisfaction of the Examiner in the Preliminary Amendment, Applicants expected a notice of allowance. Instead, Applicants received an Election/Restriction requirement.

In a telephone conversation with Examiner Pascua, the above scenario was discussed in an effort to understand if new art or new grounds of rejection had been developed. New art was

not identified; and new grounds for rejection were not set forth. In other words, the claims pending are not rejected over art and would appear to be allowable.

Inasmuch as the claims have been searched and examined, there is no apparent reason to insist on a restriction. See MPEP § 808.02 (C). A species election leading to a restriction will not meet any applicable policy or goal but rather frustrate the expeditious handling of an allowable application. In turn, the restriction requirement should be withdrawn.

The Asserted Species Are All related

The Examiner asserts the presence of multiple species as follows:

Group I	FIGS 1-6	Two spouts in the perimeter
Group II	FIGS. 7-9	One spout in perimeter, one in side wall or panel
Group III	FIG. 10	One spout in perimeter, one in side wall or panel with a tube connecting to a bite valve
Group IV	FIG. 11	One spout in perimeter, one in side wall or panel with a bite valve connecting to a spout
Group V	FIG. 12	Two spouts in perimeter, one spout in side wall or panel.
Group VI	FIGS. 14-16	Two spouts in perimeter with a bite valve connecting to a spout and a pump to another spout.

Reviewing the claims¹ and the figures, it can be seen that the figures illustrate three types or main embodiments:

- a. Two spouts in the perimeter;
- b. One spout in the perimeter and then another in the side wall or panel; and

¹Even though the claims are drafted with some relationship to the illustrated embodiments, it must be understood that the claims are not crafted to define only one or selected of the illustrated embodiments. In fact, the claims are drafted to cover all versions that embody the invention as defined by the claims including those not illustrated.

c. Three spouts in which there are two spouts in the perimeter and one in the panel or side wall.

Embodiments with a pump and a bite valve simply are adding additional limitations or a kind of accessory without changing the scope of the search which is controlled by the broad generic claims.

In reference to the three spout embodiment, Claim 30 and new claim 43 define inventions having three spouts one of which is in the side wall or panel and the other two of which are in the perimeter. Even though claims 30 and 43 can be said to be patentably distinct from claims with two spouts (e.g., claim 1, claim 32), it is nonetheless generic because to examine it, the Examiner must search and consider the art having two spouts in different configurations. See MPEP § 808.02. In addition, it cannot be ignored that the Examiner has already conducted his main search.

Stated alternately, the inventions of the two claim chains are in fact related. They are not separate and distinct. The linking subject matter can be said to be the three spout embodiment. Indeed, the claims to the two spout versions are NOT limited to two spouts. They read on structures that have three, four and more spouts. Thus, the claims are all closely connected. They are not a totally separate device for example, a mechanical joint useful in transmissions and door knobs. The inventions at hand do not have a status in the art as to require searching in disparate arts unrelated to flasks.

In summary then, Applicant acknowledges that the figures disclose embodiments as noted above. However one is a linking embodiment because it has three spouts.

Mutually Exclusive Characteristics

Under MPEP § 806.04(f), "[c]laims to be restricted to different species must be mutually exclusive." A test is expressed in MPEP § 806.04(f) by which different species are deemed to be extant if ". . . one claim recites limitations which under the disclosure are found in the first species but not in a second, while the second claim recites limitations disclosed only for the second species and not the first." Claim 30 establishes that the structure of claim 1 and the structure of claim 27 are not mutually exclusive.

In this application, there are no features that are per se excluded from one claim chain because they appear in another. That is, a device or structure of FIG. 12, falls within the scope of claims 1, 27, and 30. The use of spouts in the perimeter does not preclude the use of spouts in the wall or panel of the flask. Thus, the fundamental test used to establish the existence of a species rejection cannot be found here. FIG. 12 illustrates that the two spout perimeter version does not preclude use of other spouts; and vice versa.

New Generic Claims

Applicant here seeks to add new claims 38, 39 and 40 which are all generic because they in effect seek to define devices in which one spout is in the perimeter and another is in either the perimeter or the side panel or wall. Even if the claimed devices have a solid wall with a perimeter seal at the top and bottom or at its sides, a wall made of two panels sealed together as shown, or a single sheet encircling and sealed at opposite edges plus at the top and bottom, the multispout feature is presented by placing one in a perimeter and the other in either a side panel or wall or the perimeter. Of course a third spout is added as well.

These claims are generic so that no species election or requirement will be proper if and when allowed.

Objection to Species

Applicants object to the species election requirement because claims should be construed consistent with what is disclosed. They should not be construed based only in part on what is disclosed. In *Markman v. Westview Instruments*, 52 F.3d 967, 979 (Fed. Cir. 1995), the Federal Circuit outlined the basic tools to be used to determine the meaning of the patent claims. Specifically, it was held that one is to "consider three sources: [T]he claims, the specification and the prosecution history" to ascertain the meaning of patent claims.

Beyond that, the scope of a claim cast in means-function language is broader than one selected species. Under 35 U.S.C. § 112 last paragraph, the means is to be all those disclosed plus their equivalents. Limiting a claim to a particular "species" is therefore contrary to the literal wording of and the intent of 35 U.S.C. § 112 last paragraph. Therefore, applicant requests that the species requirement be withdrawn.

The Examiner relies on 35 U.S.C. § 121, it may be noted that the statute is directed not at species of an invention but at distinct inventions set out in the claims. Here, we do not have separate and distinct inventions so unrelated as to warrant different searching and different examination. The species requirement as here applied is inconsistent with controlling precedent of the Federal Circuit and is not required by 35 U.S.C. § 121. It is asserted that the species requirement is not here applicable.

Provisional Election

Applicant objects to the requirement to elect. However, Applicant provisionally elects FIG. 12. Claims readable thereon are claims 1-16, 27-30, 36 and 38-43. Claims 17-26, 31, 32, 37 and 44 are provisionally canceled without prejudice as directed to a non elected species.

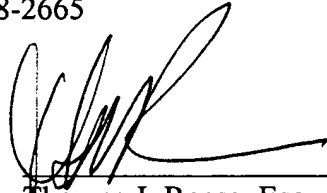
CONCLUSION

Applicant objects to the species and to the election requirement as unfounded since the search has already been conducted and for other reasons as stated herein.

Applicant suggests that generic claims are allowable so that no claims need be canceled.

To the extent any fees are due in connection with this communication, Applicant requests that they be withdrawn from deposit account no. 08-2665

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Enclosures: Office Action of June 27, 2001
Notice of Abandonment of July 5, 2001